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May 2, 2007

No. 06-9130

IN THE SUPREME COURT OF THE UNITED STATES

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a prisoner's claim under the Federal Tort Claims Act that prison guards mishandled his property during an inter-prison transfer is barred by 28 U.S.C. 2680(c), which precludes the government's liability in tort for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The order of the district court dismissing the complaint (Pet. App. 8a-21a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on October 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the United States' sovereign immunity and renders the United States liable in damages for the

> negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

> United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

Congress, however, expressly excluded from that waiver of liability:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.

28 U.S.C. 2680(c), as amended by the Civil Asset Forfeiture Reform Act of 2000 (Reform Act), Pub. L. 185, § 3(a), 106th Cong., 2d Sess., 114 Stat. 211. Congress then narrowed that "detention of goods" exception to preserve liability for a subset of claims arising out of forfeitures, specifying that

> the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer if --
>
> > (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
> >
> > (2) the interest of the claimant was not forfeited;
> >
> > (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> >
> > (4) the claimant was not convicted of a crime for which the interest of the claimant

> in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. 2680(c).

2. Petitioner is a federal prisoner. He is currently incarcerated at the United States Penitentiary in Inez, Kentucky. In December 2003, the Bureau of Prisons transferred petitioner from a federal penitentiary in Atlanta, Georgia, to the Inez facility. Prior to that transfer, petitioner was required to deliver his personal property to the Atlanta penitentiary's Receiving and Discharge Unit (Unit) for transfer to Inez. Petitioner alleges that, due to insufficient staffing at the Unit, he was told to leave his personal property with the Unit without an inventory being completed. Pet. App. 9a-10a.

Petitioner further alleges that, when his property arrived at the Inez facility, some items were missing, including two copies of the Qur'an, a prayer rug, stamps, locks, and some clothing. He claims that officers told him that, if he wished to receive his property, he had to sign a form acknowledging receipt of his property, and further that he could file a federal tort claim concerning any missing items. Pet. App. 10a-11a.

Petitioner subsequently filed an administrative tort claim with the Bureau of Prisons, which was denied in August 2004. Pet. App. 12a-13a.

3. Petitioner filed suit in district court against the federal Bureau of Prisons and prison officials in both their

official and individual capacities, asserting claims under the FTCA, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq., and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc et seq. He also asserted violations of his constitutional rights under the First, Fourth, and Fifth Amendments, see Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In addition to recovery for the value of his lost property, petitioner sought compensatory damages of $125,000 from the United States and $50,000 from each individual defendant, $30,000 in punitive damages from each individual defendant, and injunctive relief. Pet. App. 13a-14a & n.4.

The district court dismissed petitioner's complaint. Pet. App. 8a-21a. The district court held that petitioner's FTCA claim was barred by Section 2680(c)'s exception for the detention of goods by law enforcement officers. Pet. App. 15a-17a. The court then dismissed petitioner's remaining claims without prejudice for failure to exhaust administrative remedies. Id. at 17a-21a.

4. In an unpublished decision, the court of appeals affirmed in part and vacated the district court's judgment in part. Pet. App. 1a-7a. The court first affirmed the dismissal of petitioner's FTCA claim, ruling that petitioner's case fell within the "detention of goods" exception, 28 U.S.C. 2680(c). Pet. App. 3a-5a. Relying on the Eleventh Circuit's prior decision in Schlaebitz

v. United States Department of Justice, 924 F.2d 193 (1991), the court held that Bureau of Prisons officials are "law enforcement officers" within the meaning of Section 2680(c), and that claims like petitioner's for damages arising from the "negligent storage or handling" of property fall within the exception's plain scope. Pet. App. 4a (citing Kosak v. United States, 465 U.S. 848, 854-859 (1984)).

With respect to petitioner's non-FTCA claims, the court of appeals vacated the district court's order of dismissal. The court concluded that the record was "unclear whether [petitioner] was in fact misled by prison officials" into believing that his FTCA administrative complaint also exhausted his non-FTCA claims, making disposition of that issue on a motion to dismiss inappropriate. Pet. App. 6a-7a. The court accordingly remanded the case to the district court for further proceedings on petitioner's claims under Bivens, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. Id. at 7a.[1]

DISCUSSION

Petitioner contends (Pet. i, 8-24) that this Court's review is warranted to resolve a conflict in the circuits on the question whether the exception to the FTCA's waiver of sovereign immunity for the detention of goods by law enforcement officers, 28 U.S.C.

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[1] According to the U.S. Attorney's Office in Atlanta, Georgia, the proceedings on remand are currently going forward with discovery. Motions for summary judgment are due on July 30, 2007.

2680(c), applies to detentions of property by prison officials, or instead applies only to detentions of property by officers acting in an excise or customs capacity.[2] The government agrees that there is a conflict in the circuits, and that, at this point, the conflict is highly unlikely to dissipate through further consideration of the issue in those or other circuits. Furthermore, as evidenced by the volume of court of appeals decisions, the issue is a recurring one. Therefore, the government does not oppose granting the petition for a writ of certiorari, despite the interlocutory posture of this case.

1. In Kosak v. United States, 465 U.S. 848 (1984), this Court left open the question of what kind of law enforcement officers, other than customs and tax officials, are covered by the reference to "any other law enforcement officer" in Section 2680(c). Id. at 852 n.6. The Court thus did not resolve whether the exception applies, as its text provides, to "any other law enforcement officer" (emphasis added), or whether, notwithstanding that text, Section 2680(c) is limited to officers acting in a tax or customs capacity.

Since this Court's decision in Kosak, Congress has amended Section 2680(c)'s "detention of goods" exception in a manner that

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[2] Petitioner does not separately seek this Court's review of the court of appeals' determination (Pet. App. 4a) that his claim involves the "detention" of goods, within the meaning of Section 2680(c) and this Court's decision in Kosak.

underscores the exception's breadth. In 2000, the Reform Act expanded the exception to apply explicitly to the detention of "any * * * other property," and not just to the detention of "any goods [or] merchandise." See Pub. L. 185, § 3(a), 106th Cong., 2d Sess., 114 Stat. 211. In addition, the Reform Act amendments carved out of the exception claims arising from the seizure of property under "any" provision of federal law providing for forfeiture, if certain conditions are satisfied. See ibid. Congress's enactment of that provision presupposes that, but for such a change in the law, the forfeitures undertaken by a broad variety of federal law enforcement agencies -- not just customs and tax officials -- would have been categorically excepted from FTCA coverage. See H.R. Rep. No. 192, 106th Cong., 2d Sess. 8-9, 18 (1999) (noting that "[t]he federal government is exempted from liability under the Federal Tort Claims Act for damage to property while detained by law enforcement officers," and thus that the FTCA would not permit, e.g., a suit for damage to a private airplane seized by Drug Enforcement Agency officers as part of a domestic drug investigation).[3]

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[3] Federal agents are empowered to seize and forfeit goods in a wide variety of circumstances beyond customs or excise enforcement. See, e.g., 21 U.S.C. 881 (forfeiture and seizure by the Attorney General of property used in the manufacture and sale of controlled substances); 21 U.S.C. 334 (seizure of misbranded, counterfeit, and adulterated foods, drugs, and cosmetics); 18 U.S.C. 981 (forfeiture of property involved in specified crimes).

2. The courts of appeals have issued conflicting decisions on the question of the scope of Section 2680(c)'s application to the detention of goods by law enforcement officers. Five courts of appeals, including the court below, have held that the exception reaches all detentions by law enforcement officers, not just those done by customs and tax officials. See Pet. App. 3a-4a; Chapa v. Department of Justice, 339 F.3d 388, 390 (5th Cir. 2003); Bramwell v. Bureau of Prisons, 348 F.3d 804, 807 (9th Cir. 2003), cert. denied, 543 U.S. 811 (2004); Hatten v. White, 275 F.3d 1208, 1210 (10th Cir. 2002); Schlaebitz v. Department of Justice, 924 F.2d 193, 195 (11th Cir. 1991); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988).[4]

Four circuits have limited the exception to the tax and customs context. Two of those cases involved the version of Section 2680(c) that predated the Reform Act amendments in 2000. See Kurinsky v. United States, 33 F.3d 594, 598 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995); Bazuaye v. United States, 83

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[4] Prior to the 2000 amendments, the Second and Eighth Circuits likewise applied Section 2680(c) to cases that did not involve customs or excise officers, but they did so without expressly addressing the question raised here concerning the reach of the phrase "any other law enforcement officer." Formula One Motors, Ltd. v. United States, 777 F.2d 822, 823-824 (2d Cir. 1985) (drug enforcement agents); Cheney v. United States, 972 F.2d 247, 248 (8th Cir. 1992) (per curiam) (narcotics agents). The Third Circuit has also suggested, in dicta, that a claim against the FBI for property damage "might have been barred" under Section 2680(c). United States v. Bein, 214 F.3d 408, 416 (3d Cir. 2000), cert. denied, 534 U.S. 943 (2001).

F.3d 482, 486 (D.C. Cir. 1996). But the Seventh and the Fourth Circuits have each held, in cases involving claims against prison officials arising under the amended version of Section 2680(c), that the exception applies only to officers acting in a tax or customs capacity. See Dahler v. United States, 473 F.3d 769, 771-772 (7th Cir. 2007); Andrews v. United States, 441 F.3d 220, 222-228 (4th Cir. 2006); but see id. at 229-230 (King, J., dissenting).

Of particular relevance here, a number of courts have held, like the court of appeals here (Pet. App. 4a), that the exception extends to Bureau of Prisons officers, posing a square conflict with the Seventh Circuit's decision in Dahler and the Fourth Circuit's decision in Andrews. See Bramwell, supra; Chapa, supra; Greer v. United States, No. 02-3414, 72 Fed. Appx. 793 (10th Cir. Aug. 5, 2003), cert. denied, 541 U.S. 1087 (2004); Hatten, supra.[5]

That conflict is highly unlikely to be resolved without this Court's intervention. The Fourth and Seventh Circuits' recent decisions in Andrews and Dahler demonstrate that Congress's 2000 amendments to the text of Section 2680(c) will not resolve the conflict. Furthermore, both the Fourth and Seventh Circuits denied the government's petitions for rehearing en banc, while acknowledging that their decisions created an inter-circuit

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[5] The issue is currently pending in the Second Circuit. See ABC v. DEF, No. 06-1362 (argued Apr. 23, 2007).

conflict. See Dahler, 473 F.3d at 772; Andrews, 441 F.3d at 228.[6]

The number of cases that have arisen also documents that the issue is a recurring one of importance to both the federal government and to those seeking to bring suits under the FTCA. Restoring uniformity and stability to the interpretation and operation of a federal law is an established basis for this Court to exercise its discretion to grant the petition for a writ of certiorari. See S. Ct. R. 10(a).

That is particularly true when, as here, the question of statutory construction involves a waiver of sovereign immunity. As this Court has long recognized, federal courts have a special duty to ensure both that they do not mistakenly impose burdens on the public fisc that Congress did not authorize, and that "public funds will [only] be spent according to the letter of the difficult judgments reached by Congress as to the common good." OPM v.

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[6] Prior to the emergence of a circuit conflict under the amended version of Section 2680(c), the United States filed a number of briefs opposing the grant of certiorari on this issue. See, e.g., U.S. Br. in Opp. 5-6 & n.3, Rigsby v. United States, 543 U.S. 955 (2004) (No. 03-11038); U.S. Br. in Opp. 8-10, Greer v. United States, 541 U.S. 1087 (2004) (No. 03-8804); see also Pet. 19 n.15. At that time, the United States suggested that Congress's enactment of the Reform Act might result in elimination of the pre-existing circuit conflict as courts reconsidered their position in light of the newly enacted language underscoring the exception's breadth. Since the filing of those briefs in opposition, however, the Fourth Circuit in Andrews and the Seventh Circuit in Dahler have both held in post-amendment cases that the exception remains inapplicable outside the customs and excise context, and both of those courts have denied the government's petitions for rehearing en banc.

Richmond, 496 U.S. 414, 428 (1990); see also U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

3. Although the question presented merits this Court's review, this case does arise in an interlocutory posture. While the court of appeals held that petitioner's FTCA claim is barred, that court reversed the district court's dismissal of petitioner's alternative claims for relief under the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq.[7] The court of appeals remanded those claims to the district court, where discovery is going forward and motions for summary judgment are due on July 30, 2007.

Were petitioner to obtain the monetary relief he seeks under those claims, the court's resolution of the question presented here would be of no practical significance. There is, however, substantial doubt whether petitioner could obtain full relief on remand under those alternative claims. It is the position of the United States that, in light of the dismissal of petitioner's FTCA claim ordered by the court of appeals, the FTCA's judgment bar

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[7] Petitioner also seeks relief under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc et seq. (see Pet. App. 2a), but the institutionalized persons provisions of that statute do not apply to the federal government or to officials acting under color of federal law. See 42 U.S.C. 2000cc-1, 2000cc-5(4).

would foreclose his Bivens claim. See 28 U.S.C. 2676.[8] The impact of the court of appeals' decision on petitioner's Bivens claim weighs in favor of granting review on the FTCA issue despite the interlocutory posture of the case.

While petitioner also seeks relief under RFRA, that claim pertains only to the alleged loss of petitioner's religious property and thus could not provide any sort of relief for his other claimed losses. Moreover, money damages may not be obtained under RFRA in cases against the government, because RFRA's authorization of "appropriate relief," 42 U.S.C. 2000bb-1(c), does not expressly authorize an award of money damages. See Webman v. Federal Bureau of Prisons, 441 F.3d 1022, 1025-1026 (D.C. Cir. 2006); see generally Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Village, Inc., 503 U.S. 30, 37, 39 (1992).

Finally, whatever the ultimate disposition of those other

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[8] Cf. Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180, 184 (7th Cir. 1996) (judgment bar applies to "all judgments, both against and in favor of the government"); Gasho v. United States, 39 F.3d 1420, 1437-1438 (9th Cir. 1994) (dismissal of earlier FTCA claims bars subsequent Bivens action), cert. denied, 515 U.S. 1144 (1995); but see Hallock v. Bonner, 387 F.3d 147, 154-155 (2d Cir. 2004) (judgment bar does not apply where FTCA claim is barred by an exception under Section 2680(c)), vacated on other grounds, 126 S. Ct. 952 (2006).

The Eleventh Circuit has not yet addressed the question of the jurisdictional bar's application in this context. Last Term, this Court granted review to consider whether the judgment bar applies to dismissals based on an exception to the FTCA's substantive coverage, but the Court did not resolve the issue because it vacated the court of appeals' decision for lack of jurisdiction under the collateral order doctrine. See Will v. Hallock, 126 S. Ct. 952, 957 (2006).

claims, it will not affect petitioner's FTCA claim, which the court of appeals has definitively rejected as a matter of law.

In sum, while the United States does not oppose this Court's granting the petition for a writ of certiorari given the circuit conflict and given the court of appeals' definitive rejection of petitioner's FTCA claim, the Court may prefer to await a case that does not arise in an interlocutory posture. As petitioner notes (Pet. 15), the question recurs with some frequency, and thus other opportunities for review that do not involve interlocutory decisions are likely to arise in short order.

CONCLUSION

The government does not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

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